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NO. 94-192

In the Supreme Court of the United States

October Term, 1994

DAN E. MOLDEA,
Petitioner,

v.

THE NEW YORK TIMES COMPANY,
Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For the District of Columbia Circuit

REPLY TO BRIEF IN OPPOSITION

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This is not a case about a "bad review," at least not in the sense that it harshly criticized Petitioner, Dan E. Moldea's ("Moldea") book, Interference: How Organized Crime Influences Professional Football ("Interference").[1] It is a case about a deliberately untruthful review which all but destroyed Moldea's professional reputation as an investigative journalist.

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[1]Interestingly, however, other sources have noted the sub-standard quality of the Review itself. See John Leonard, THE NATION, July 11, 1994, at 60-61 (where Mr. Leonard, a former editor of The New York Times Book Review wrote, "I've read Interference, and Gerald Eskenazi's Times review of it, and if we are to deplore sloppy journalism we must admit that sloppy reviewing is one of its drearier subdivisions"); Christopher Hanson, COLUMBIA JOURNALISM REVIEW, May/June 1994, at 21 ("Moldea has reason to be upset. I would, of course, never dream of suggesting that the review was sloppy. But after comparing what the book says with what the review says it says, one might conclude that Eskenazi was some distance from Pulitzer territory").

Moldea's Petition is also not limited to the two statements that were addressed by the District of Columbia Circuit Court of Appeals in Moldea v. New York Times Company, 22 F.3d 310 (D.C.Cir. 1994) ("Moldea II"). Moldea has never agreed with the Respondent, The New York Times Company's ("The Times") contention that the four-word phrase "too much sloppy journalism" is the "focal point" of the Review. See The Times' Brief In Opposition at 3 ("Oppos. at ___"). To the contrary, Moldea has always maintained that each of the statements cited in his Complaint are independently actionable, and his Petition challenges the lower courts' disposition of each of the statements on legal grounds. Petition at 12 ("Pet. at ___").

ARGUMENT

I. There Is A Circuit Conflict Concerning The Relevance Of Broader Context To The Verifiability Analysis After Milkovich v. Lorain Journal Co.

In its Opposition, The Times disputes Petitioner's claim that Moldea II is at odds with this Court's decision in Milkovich v. Lorain Journal Co., 497 U.S. 1 (1990). See Oppos. at 11. To the contrary, The Times asserts that

> "the Moldea II court makes clear that it was firmly guided by Chief Justice Rehnquist's opinion in [Milkovich]. In decidedly unambiguous terms, the court defined its task as 'determin[ing] as a threshold matter whether a challenged statement . . . is verifiable -- that is, whether a plaintiff can prove that it is false . . . . The key to this case is the question of verifiability.'"

Id. (quoting Moldea II at 316-317.)

In Milkovich, this Court looked at only three factors in determining whether

the statements in question were actionable: 1) whether the statements were couched in "the sort of loose, figurative or hyperbolic language which would negate the impression that the writer was seriously maintaining [that Milkovich] committed the crime of perjury;" 2) whether "the general tenor of the article negate[d] this impression;" and 3) whether "the connotation that [Milkovich] committed perjury [was] sufficiently factual to be susceptible of being proved true or false." 497 U.S. at 21. Significantly, however, broader context played no part in this Court's analysis.[2]

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[2]In his Milkovich dissent, former Justice Brennan maintained that courts should continue to look at all four Ollman factors purportedly consistent with this Court's majority opinion. See 497 U.S. at 24, 32-33 (Brennan, J., dissenting). Justice Brennan's dissent has since been relied upon by federal and state courts for the proposition that broader context or (continued...)

That was decidedly not the case in Moldea II, however. Moldea II not only considered the "broader context" in which the challenged statements appeared, i.e., a book review, it determined that it was necessary to fashion an alternative verifiability test based solely upon that consideration. Moldea II at 313.[3]

The Times seeks to explain away this Court's refusal to consider broader context in Milkovich as being due to the fact that "the inescapably factual nature of a perjury charge is not the usual stuff of

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[2](...continued)
genre remains relevant after Milkovich. See, e.g., West v. Thomson Newspapers, 872 P.2d 999, 1020 (Utah 1994).

[3]Notwithstanding The Times' disingenuous assertion to the contrary, see Oppos. at 12, the resulting supportable interpretation test is most assuredly not a mere compliment to Milkovich's reasonable juror verifiability test, but will supplant it in every instance involving a book review (and presumably any analogous genre or format).

sports columns." Oppos. at 14. Leaving aside The Times' conveniently narrow view of what is and what is not the regular fare of sports columns today,[4] it strains credulity to suggest that this Court expended the time and effort necessary to craft the Milkovich opinion if it was only designed to apply when opinion writers step outside the confines of their respective forums to deliver defamatory statements on non-traditional subjects. Surely, Milkovich is not limited to its facts.

The Times' second argument, that there is no circuit conflict because courts uniformly consider context in assessing verifiability of language begs the threshold question how context should be defined. The District of Columbia Circuit

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[4]The recent events involving Tonya Harding and O.J. Simpson are merely two examples of instances where off the field issues have dominated the sports pages.

in Ollman v. Evans, 750 F.2d 970 (1984), cert. denied, 471 U.S. 1127 (1985), concluded that there are two distinct context factors. Id. at 982-984. First, there is general context which relates to the phrase, sentence, paragraph, etc. in which the challenged statements appear. Id. at 982-983. Second, there is broader context, which relates the format or genre in which the statements appear. Id. at 983-984.

The Times misleadingly lumps both context factors together in support of its argument that there is no circuit conflict. However, while general context (or tenor) continues to bear on verifiability after Milkovich,[5] the role of broader context is

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[5]Moldea has never contended that general context should be ignored. To the contrary, Moldea has always maintained that the challenged statements must be read in the context of the entire Review, and not in isolation.

unsettled because this Court did not expressly state that the factor should not be relied upon. Pet. at 30-33.

One line of cases, most notably Phantom Touring, Inc. v. Affiliated Publications, 953 F.2d 724 (1st Cir.), cert. denied, 112 S.Ct. 2942 (1992), takes the view that Milkovich does not forbid the consideration of broader context, but that the factor was merely "discounted" in Milkovich. 953 F.2d at 729 n.9. Accordingly, the First Circuit in Phantom Touring considered the fact that challenged statements appeared in a theater review as part of its verifiability analysis. 953 F.2d at 729.

However, other courts, including the Ninth Circuit in Unelko Corp. v. Rooney, 912 F.2d 1049 (9th Cir. 1990), cert. denied, 499 U.S. 961 (1991), only look to the three factors considered by this Court

in Milkovich. Id. at 1053-55. Under this second approach, broader context is simply irrelevant.

The contours of the conflict appear in stark relief when one compares the District of Columbia Circuit's conflicting readings of Milkovich in Moldea v. New York Times Co., 15 F.3d 1137 (D.C.Cir. 1994) ("Moldea I") and Moldea II. Speaking on behalf of the majority in Moldea I, Judge Edwards (now Chief Judge) flatly rejected the application of the broader context factor and held that "assertions that would otherwise be actionable in defamation are not transmogrified into nonactionable statements when they appear in the context of a book review." Moldea I at 1146.

Less than three months later, however, the same esteemed judge held that "[w]hile Milkovich could be interpreted as we read it in our initial decision, we are

unwilling to assume that the Court meant to sweep away so much settled law [concerning the importance of broader context] without a clearer indication that this was indeed its intent." Moldea II at 315.

Moldea does not believe this Court's treatment of the broader context factor in Milkovich was ambiguous. However, the District of Columbia Circuit concededly does, and the divergent decisions of some of the other circuit courts suggest that it may be. Since this case presents an ideal opportunity to clarify the role, if any, broader context is to play after Milkovich, Petitioner respectfully submits that his Petition should be granted to resolve this clear conflict.

II. Moldea II's Employment Of The Supportable Interpretation Test At The Threshold Verifiability Stage Conflicts With This Court's Decisions in Milkovich and Masson v. New Yorker Magazine, Inc.

In Milkovich, this Court acknowledged the tension that exists between "the [First] Amendment's vital guarantee of free and uninhibited discussion of public issues" and "'[s]ociety['s] . . . pervasive and strong interest in preventing and redressing attacks upon reputation.'" 497 U.S. at 22 (quoting Rosenblatt v. Baer, 383 U.S. 75, 86 (1966). This Court concluded that its decision in Milkovich "[held] the balance true." 497 U.S. at 23.

The same cannot be said about Moldea II, however. Moldea II's blanket adoption of the supportable interpretation test at the threshold verifiability stage whenever book reviews are involved ensures that

reviewers can now attack authors' reputations with virtual impunity. Since the "corrective value of the 'marketplace of ideas'" provides cold comfort to all but a few of the most prominent writers,[6] see Oppos. at 8 (quoting Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)), review by this Court is imperative if the delicate balance deemed

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[6]There was no exchange of ideas in Moldea's case. Pet. at 10. When Moldea submitted his views to The Times for publication in the hope that they might "compete" with those expressed by Gerald Eskenazi in the Review, The Times refused to print them. Id. at 10-11. Moreover, interest in the book, whether measured in terms of the number of requested interviews, reviews in other publications, or books sold completely disappeared in the wake of the Review. See, e.g., Paul M. Barrett, Author Who Sued Over Scornful Review Is Now Scorned By The Publishing World, WALL STREET JOURNAL, April 7, 1994, at B3 (citing the fact that planned interviews with KCBS-TV of Los Angeles, California and Fox-TV were cancelled because of the Review).

so important by this Court in Milkovich is to be preserved.

Moldea II's adoption of the supportable interpretation test is also clearly inconsistent with this Court's decision in Masson v. New Yorker Magazine, Inc., 501 U.S. 496 (1991). In Masson this Court reversed the decision of the Ninth Circuit Court of Appeals, holding that the application of the analogous rational interpretation test for purposes of determining malice was inappropriate in cases involving "fabricat[ed] . . . quotations or any analogous claim. 501 U.S. at ___, 111 S.Ct. at 2433 (emphasis supplied).[7]

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[7]Moldea previously argued in his Petition that there is no justifiable basis for concluding that non-fiction, investigative works generally and Interference in particular, are ambiguous sources. Pet. at 45-48. Despite the Times' efforts to convince this Court (continued...)

Here, Moldea's Complaint is premised upon The Times' publication of a review that deliberately and materially mischaracterized what Moldea said in Interference. As such, it is clearly an "analogous claim" and should not be analyzed under the supportable interpretation standard. Review by this Court is necessary because Moldea II improperly limits this Court's rejection of the rational interpretation standard in Masson to circumstances involving fabricated quotations. Moldea II at 316 n.3. Pet. at 41-49.

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[7](...continued)
otherwise, the relevant passages in Interference remain unambiguous. Thus, the District of Columbia Circuit's reliance on Masson was clear error.

III. The Supportable Interpretation Standard Conflicts With This Court's Decisions Because It Shifts The Burden Of Proof To The Non-Movant Libel Plaintiff At The Summary Judgment Stage

In the final section of its Opposition, the Times attempts to distort the true nature of Moldea's third question. Moldea is not primarily concerned with Moldea II's ultimate disposition of his claim on substantial truth grounds (although Moldea disagrees with the court's finding), but rather with the court's misapplication of governing summary judgment principles.

This Court has held that where a defamation "plaintiff seeks damages against a media defendant for speech of public concern . . . the plaintiff bear[s] the burden of showing falsity, as well as fault, before recovering damages." Philadelphia Newspapers, Inc. v. Hepps, 475

U.S. 767, 776, 777 (1986). Petitioner does not dispute that he bears the ultimate burden of proving falsity at trial, but asks whether media defendants are entitled to favorable treatment at the summary judgment stage. Pet. 49-60.

The Moldea II court determined that they are. Consistent with this view, the Moldea II court rejected Milkovich's reasonable juror test in favor of its own supportable interpretation standard, Moldea II at 313, a test that put Petitioner at a marked disadvantage as can readily be seen by comparing Moldea I and II's respective handling of the "revives the discredited notion" statement.

In Moldea I, the court held that the statement was actionable because "[a] jury could . . . find that the implication intended by the 'revives the discredited notion' passage was not simply that Moldea

discusses a 'discredited notion,' but that Moldea does not reveal what Eskenazi implies is the well-known truth about Rosenbloom's death." Moldea I at 1148.

In Moldea II, however, while conceding that a reasonable jury could reach the foregoing conclusion, the court nevertheless determined that the statement was nonactionable because Interference's failure to "reveal that Rosenbloom's death was accidental until 35 pages after giving undeniably titillating hints of homicide" reasonably supported the alternative interpretation that "Moldea sought to 'revive' the notion that Rosenbloom was murdered in order to build suspense before disproving that theory." Moldea II at 318.[8]

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[8]Moldea II's determination, as a matter of law, that its alternative interpretation of the "revives the discredited notion" (continued...)

The supportable interpretation standard dramatically favors media defendants because it shifts the burden at the summary judgment stage from the media defendant to the non-movant, plaintiff. If this new test is allowed to stand, libel plaintiffs will no longer be able to survive summary judgment by showing that a reasonable jury could find that the challenged statements are false whenever media defendants arguably engage in an interpretive exercise. Instead, they will be forced to establish as a matter of law that no reasonable person could find that

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[8](...continued)
statement was supportable also ran afoul of well-settled summary judgment principles. If the court had adhered to this Court's decision in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and refrained from weighing the evidence and gave Petitioner the benefit of all reasonable inferences, it would have been required to leave the issue of whether its alternative interpretation was supportable for the jury. Id. at 255.

the challenged statements are supportable interpretations of the book, or other underlying subject matter of the speaker's commentary.[9] Moldea II at 317.

This approach flies in the face of the idea that Rule 56 motions must be decided with procedural neutrality in cases involving media defendants, a policy favored by this Court in Anderson v. Liberty Lobby, Milkovich and Masson, as well as by a number of the federal circuit courts. See Pet. at 52 (and cases cited therein). Petitioner respectfully submits that this Court's review of Moldea II is necessary to ensure that other courts do not follow the District of Columbia

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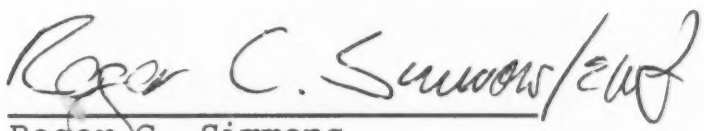
[9]This means that media defendants will be entitled to judgment as a matter of law if they can offer (or the court can itself divine) a reasonably supportable interpretation of the statement at issue.

Circuit's lead in favoring media defendants at the summary judgment stage.

CONCLUSION

For the reasons set forth above, as well as those stated in his May 3, 1994 Petition, Moldea respectfully prays that a writ of certiorari issue.

Respectfully submitted,



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